[APPELLATE CIVIL JURISDICTION]

BURTON, J., WHITLEY & TERRELL, J.J.

O. K. R. S. T. ARUMUGAM.....Defendant (Appellant)

vs.

K. R. S. S. P. SUPPIAH CHETTIAR..Plaintiff (Respondent)

[SINGAPORE CIVIL APPEAL No. 28 of 1932]

Practice—Order for discovery—No Indorsement of memorandum upon service copy—Civil Procedure Code, Ss. 342, 352, 560.

Section 560 of the Civil Procedure Code provides that a memorandum shall be endorsed on the service copy of every judgment or order requiring any person to do an act thereby ordered warning the party required to obey the order of the consequences of disobedience.

The Defendant failed to comply with an order to answer interrogatories. The service copy of the order was not indorsed with the memorandum under Section 560 of the Code.

Held that the punishment for contempt of the Defendant could not properly be inflicted as the necessary preliminaries had not been complied with.

Appeal from order striking out the Defendant's Defence and giving leave to sign Judgment on the Statement of Claim.

In this civil action the Defendant on the 15th June, 1932 delivered certain interrogatories to the Plaintiff.

On the 24th June, 1932 the Plaintiff delivered Replies.

On the 24th June, 1932 the Plaintiff delivered certain interrogatories to the Defendant. The Defendant did not deliver any replies. The Plaintiff thereupon applied to Court by Summons in Chambers and obtained on the 8th July, 1932 an order that the Defendant do within 7 days answer the interrogatories which were attached to the said Summons in writing by affidavit. On the 13th June, 1932 the Defendant filed an affidavit purporting to answer the said interrogatories but the Plaintiff was not satisfied with these answers and on the 9th September, 1932 he applied by way of Summons in Chambers and obtained an order that the Defendant personally do on or before the 9th day of October, 1932 make and file a further affidavit fully and sufficiently answering the Interrogatories 1 and 2 delivered to him by the Plaintiff on the 24th June, 1932 pursuant to the Order of Court of the 8th July, 1932. The Defendant failed to comply with the said Order of Court of the 9th September, 1932.

The Plaintiff thereupon applied by way of Summons in Chambers for an order that the Defendant's defence filed on the 15th June, 1932 be struck out and that the Defendant be placed in the same position as if he had not defended and that the Plaintiff should be at liberty to sign final judgment on the Statement of Claim, the Defendant having failed to comply with the order of Court dated the 9th September, 1932 for interrogatories.

On the application coming on for hearing in Chambers on the 28th October, 1932 the Chief Justice (Sir W. Murison) made an order in terms of the Plaintiff's application and certified for no further argument.

The grounds of decision were as follows:—

MURISON, C.J.—The Plaintiff originally sued the Defendant herein on the 6th April, 1932 for an account of what was due by Defendant to Plaintiff on an agreement to advance monies on a mortgage to them by one Md. Khan Suratee.

Appearance 15th April, Statement of Claim 5th May and Defence 15th June followed.

On the 15th June, 1932 the Plaintiff administered interrogatories which were answered, but not satisfactorily by the Defendant on the 24th June, 1932.

The Plaintiff got an order for further Interrogatories on the 8th July 1932, the order to be complied within seven days.

These were answered, but again not satisfactorily, on the 13th July, 1932.

An order for further interrogatories followed on the 9th September, 1932. These were to be answered within one month, the Defendant having now gone to India.

The order of the 9th September has never been complied with. Section 352 of the Civil Procedure Code therefore applies.

On the 17th October the Plaintiff applied by Summons to have the Defendant's defence struck out, and to be at liberty to sign Judgment on his statement of claim (Summons No. 1512).

The Defendant's attorney in his affidavit of 20th October, 1932 in defence says that his solicitor did not get a copy of the order of the 9th September until the 13th September. But Mr. Johannes, his Counsel, was present when the order was made—as is noted in my book under date 9th September, 1932. Further, the Defendant could have wired the contents of the order. He did not. He could have sent the order by first mail to South India. He did not. He said he was busy in Johore. Even so the Defendant knew what had been ordered by the 25th September—for the post only takes 10 days from Singapore to the Ramnad District, South India and he still had 14 days to answer the questions and post them to Singapore.

The Defendant's attorney then produced a doctor's certificate attached to the said affidavit. It is dated 2nd September, 1932 and is signed by Dr. R. Bheem Singh, a "registered medical practitioner" of Southern India. It says the Defendant is ill and is unfit to travel and that it will be at least a month before he recovers.

I assumed the certificate to be genuine, and not exaggerated; but the following observations are to be made on it.

The Defendant was not asked to travel. He was asked to answer questions which could quite easily have been answered. Anyhow, even taking the certificate at its face value Defendant was presumably well by the 2nd October and could easily have arrived in Singapore by the date of the hearing of the summons to strike out, namely the 21st October. Alternatively he could have sent answers to the Interrogatories. They did not arrive, nor was there even a telegram from the Defendant saying they were coming.

The Defendant's attorney further in his affidavit of 20th October says that since the service of the summons to strike out (17th October) he sent a telegram to the Defendant but had received no reply.

In my opinion the whole history of the Defendant's conduct in regard to these interrogatories from the 15th June, 1932 to now, shows that the defendant has done everything he could to avoid answering them. I therefore, made the order, in terms of the summons of the 17th October, 1932. This is the order now appealed against.

I believe that this appeal is filed only for the purpose of further delay.

From this decision the Defendant appealed.

The Appeal came on for hearing on the 24th November, 1932 before Burton, J., Whitley, J. and Terrell, J.

Williamson (*Johannes* with him) for the Appellant raised a new point of law not raised in the Court below namely that the service copy of the order of the 9th October, 1932 was not endorsed with a memorandum in accordance with Section 560 of the Civil Procedure Code and that in default of proof of this the order of the Chief Justice of the 21st October, 1932 was bad.

Knowles for the Respondent in reply.

Cur. Ad. Vult.

BURTON, J.—On 31st March, 1932 Murison C. J. gave judgment in Suit No. 1303 of 1931 in favour of Arumugam against Suppiah Chettiar for $5,163.81 and costs, but reserved to Suppiah Chettiar the "liberty to take what proceedings he may be advised in respect of the $4,000 share in Suratee's Trust." The present suit was filed in pursuance of that liberty, and is in the nature of a counterclaim against the sum decreed. It was filed on 6th April, 1932, and took an uneventful course till the defence was filed on 15th June, 1932, claiming that the $4,776 claimed had been paid.

On 24th June the Plaintiff delivered to the Defendant Interrogatories asking for particulars of the payment of $4,776. No answer was delivered and on 8th July the Registrar ordered the defendant within seven days to answer the Interrogatories.

On 13th July the defendant's attorney Olaganathan Pillai, who had all along had the conduct of this action filed answers to the effect that there was a settled account between the parties on 5th September, 1929.

The Plaintiff was not satisfied with this answer and on 15th July Messrs. Braddell Brothers took out a Summons "for an order that the defendant do within four days from the date of the order to be made file a further affidavit fully and sufficiently answering the interrogatories....."

The Defendant himself had been continuously in India since and before the filing of the action.

Upon this the Chief Justice made an order dated 9th day of September, 1932, "that the defendant personally do on or before the 9th day of October, 1932, make and file a further affidavit fully and sufficiently answering the interrogatories". The Defendant's attorney countered this by a summons asking for a commission to take the defendant's evidence in India. But this summons was adjourned *sine die* until after the defendant had answered the interrogatories.

The Defendant did not comply with the order of the Chief Justice, and the Plaintiff took out a summons before the Chief Justice for an order that the defence be struck out and that the Defendant be placed in the same position as if he had not defended. The Defendant's attorney in reply to this produced a Medical Certificate dated 2nd September, 1932, from a registered Medical Practitioner in Ramnad District Southern India to the effect that the Defendant was suffering from Sprue with Diarrhoea and Neurasthenia, and was much debilitated and unfit to travel and it would take him at least a month to recover. The Chief Justice struck out the defence on 21st October, 1932. This is the order now under appeal.

The appellant argued that the Interrogatories complained of were fishing and consequently improper and that the Defendant is a firm, that Arumugam himself had left the Colony and that the firm's defence could not be struck out by reason of the misconduct of Arumugam over whom it had no control. This latter argument appears to be contrary to the decision of the Privy Council in the case of the *Firm of R.M. K.R.M.* v. *the Firm of M.R.M.V.L.* (1926) A.C. 761. But I do not propose to decide the case on that ground and for the purposes of this judgment I assume that the interrogatories were proper. The fatal objection, in my opinion, to the Chief Justice's order is the failure of the

plaintiff to observe section 560 of the Civil Procedure Code. The order of the 9th September did not contain the memorandum required by this section, and consequently, I think, the punishment for contempt of the defendant by striking out his defence could not properly be inflicted. On the assumption that the interrogatories were proper, it is clear that the Defendant was in contempt; the attorney had first of all failed to answer the interrogatories and then had answered them inadequately. Then Arumugam ordered personally to answer had similarly failed.

If then we assume that the plaintiff is in contempt, he has brought himself within the operation of section 352 of the Civil Procedure Code, and is liable to any of the penalties there provided. Section 352 of the Civil Procedure Code is in two parts; subsection (1) says that if a party fails to comply with an order to answer interrogatories he shall be liable to attachment; and subsection 2 provides that such party if a defendant, shall be liable to have his defence struck out and to be placed in the same position as if he had not defended.

Mr. Knowles argued on behalf of the Plaintiff that section 352 is divisible, that the proceedings under sub-section 1 only are in contempt and require the endorsement under section 560. The report of *Haigh* v. *Haigh*, 31 Ch. D. 478, he said, a case where a defence was struck out, contained no indication that the endorsement was made in that case; and *Hampden* v. *Wallis*, 26 Ch. D. 746, was a case of attachment, and consequently no authority for saying that the indorsement is required in proceedings under subsection 2.

But in my opinion section 560, which corresponds to Order XLI r. 5, is quite general in its terms and applies as much to one half of section 352 as to the other. In *Hampden* v. *Wallis* (*ubi sup.*) at p. 751 Baggallay, L. J. said:

> "But it is said that the service was not sufficient because the copy served did not bear the indorsement required by Order XLI r. 5.....The Order relates to all judgments and rule 5 is perfectly general in its tone; there is nothing in it limiting it to any particular kind of orders. It is suggested that it was intended to be confined to process of contempt. I can see no ground for confining it in that way."

It is true that this statement is strictly *obiter* in the case, but I can see no reason why logically section 560 should apply to part and not the whole of section 352. *Haigh and Haigh* (*ubi sup.*) was not reported on this point, and there is no reason to assume that the preliminaries in that case were not duly complied with.

The learned Chief Justice was entitled to assume, and no doubt did assume that all the necessary preliminaries had been properly complied with. In fact the required endorsement was never made, and I think that that failure to comply with section 560 is fatal to the order of 21st October striking out the defence, and I am of opinion therefore that this appeal should be allowed and that order set aside.

The appellants have succeeded in this Court on a point which was not taken before the Chief Justice, and I think that the proper order for costs is that the appellants have the costs of the trial before the Chief Justice and that there be no costs of the appeal; see *Hussey* v. *Horn Payne*, 8 Ch. D. at p. 677 and *Dye* v. *Dye*, 13 Q.B.D. at p. 158.

WHITLEY, J.—I entertain little doubt that if this case had been presented before the learned Chief Justice in the form in which it was presented before us he would not have made the order appealed against. His attention was not drawn to section 560 of the Civil Procedure Code and the effect of failure to indorse as required by that section was not argued before him.

That section which is taken from the English Order 41 rule 5 reads as follows:—

> "Every judgment or order made in any cause or matter, requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words to the effect following:—
>
> "If you, the within-named A.B. neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order.)"

It is admitted that the copy of the order of the 9th September 1932 was not indorsed with the required memorandum. The order of the 9th September required the Defendant personally to file a further affidavit fully and sufficiently answering certain Interrogatories so that it is clearly an order "requiring a person to do an act thereby ordered" and comes within section 560.

In the case of *Hampden* v. *Wallis*, 26 Ch.D. 746 which turned upon the English rules corresponding to sections 352, 353, and 560 of our Civil Procedure Code it was held by the Court of Appeal that the proceedings for attachment had failed by reason of the want of the proper indorsement. In that case the order was an order for discovery, service of which on the party's solicitor is, like

service of an order for interrogatories, under section 353 sufficient service to found an application for attachment for disobedience of the order. In the course of his judgment Bagallay, L.J. at page 752 says:—

> "Rule 5 (our section 560) is perfectly general in its tone; there is nothing in it limiting it to any particular kind of orders."

It was argued by Mr. Knowles that the present case is distinguishable from *Hampden* v. *Wallis*, inasmuch as that was an application for attachment whereas all that the present plaintiff was seeking was striking out of the defence. He bases that argument upon the wording of section 352 of the Civil Procedure Code which is as follows:—

> "(1) If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment,
>
> "(2) Such party shall, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly."

He contends that the penalties which may be imposed for non-compliance fall into two categories, the first part of the rule dealing with attachment and the second part with less drastic penalties. From the use of the words "liable to process of execution" in the form of indorsement set out in section 560 he asks the Court to infer that that indorsement is only required in cases in which the penalty subsequently sought to be imposed is attachment and not as in the present case merely striking out of defence.

This argument is I think fallacious. The foundation of section 352 is contempt of Court. A party who neglects to comply with such an order is guilty of contempt and as such renders himself liable to the punishments therein set out. The degree of severity of the particular punishment imposed seems to me immaterial, though in passing I would remark that the striking out of a defence is a sufficiently drastic punishment. It is only just that any party who may become liable to such punishment should be specifically and definitely warned of the serious consequences which may ensue upon failure to obey and accordingly section 560 lays down a procedure which shall ensure such clear notice being given.

Section 352 is a penal section and a party seeking to enforce it as against his adversary must have complied strictly with the prescribed procedure. In the absence of the indorsement the order of the 9th September 1932 was not properly served and accordingly the order appealed from should not have been made.

That disposes of the case and it is not necessary to consider the other points argued before us but I should like to add two observations on the merits.

The first is that it is clear from the learned Chief Justice's grounds of decision that the admittedly inaccurate averment in paragraph 1 of the Statement of Claim that the Defendant resides in Singapore misled him into thinking that the Defendant had gone to India after these proceedings had been instituted, and that may well have influenced him in coming to the opinion that the Defendant was being evasive.

The second observation is that paragraphs 3, 4 and 5 of the Statement of Defence are so obscurely worded that the real contention of the Defendant is not at first sight apparent. They were carefully dissected and explained to us in the light of the earlier action between the same parties and it then became clear that the Defendant's case is not that he paid this sum of $4,776 but that it was taken into account and disposed of in the previous suit. Had that been explained to the learned Chief Justice as it was to us it may well be that he would have held that the answers are not insufficient.

I would allow the appeal.

TERRELL, J.—It appears that in 1931 the present defendant Arumugam sued the present Plaintiff Suppiah on a stated account (Suit No. 1303 of 1931). Shortly before the action was heard Suppiah applied for leave to bring forward what is substantially his claim in the present action, by way of counterclaim. Leave was refused and on the 31st March 1932 Suit No. 1303 of 1931 was heard before the learned Chief Justice when judgment was given in favour of Arumugam for $5,163-81 and costs. The judgment concluded "This Court doth further order that the abovenamed defendant (Suppiah) be at liberty to take what proceedings he may be advised in respect of the $4,000- share in Suratee's Trust."

In pursuance of the liberty reserved to him Suppiah commenced the present action. In the meantime execution on the judgment obtained in Suit 1303/31 was stayed as also were bankruptcy proceedings commenced by Arumugam.

In this action Suppiah sets up an agreement whereby Arumugam agreed to advance the sum of $4,776 with interest in respect of an advance of $21,000 which Suppiah made to Mahmood Khan Suratee. This agreement is admitted in the defence. The Statement of Claim alleges that it has never been paid. The defence is

contained in paragraphs 3 and 4 which read as follows:—

"3. With regard to paragraph 5 of the Statement of Claim the defendant denies that he has not paid the sum of $4,776 but says that the same has been paid.

"4. On the 5th day of September 1929 prior to the defendant's departure for India, accounts were gone into of all transactions and dealings between the plaintiff and the defendant and the plaintiff admitted that there was then the sum of $4,250 due by him to the defendant and signed an acknowledgment to that effect in favour of the defendant. The defendant commenced proceedings against the plaintiff on the said acknowledgment in this Honourable Court and obtained judgment against the plaintiff on the 31st March 1932."

These paragraphs are not very happily worded. It was explained to the Court at the Bar that the real issue in the case is that Suppiah alleges that the arrangements with respect to the mortgage to Suratee was an independent transaction not included in the settlement of the accounts, whereas Arumugam alleges that it was included. On examining paragraphs 3 and 4 of the defence I think that they will support this defence, but the defence could have been expressed in less equivocal terms, and if that had been done much of the trouble which has befallen Arumugam would probably have been avoided.

As Arumugam in paragraph 3 of his defence alleged that the $4,776 had been paid Suppiah delivered interrogatories on the 24th June 1932 asking (1) whether it was paid in cash or by cheque and if so when, where and to whom and by whom, and (2) the defendant was asked to produce the account book relating to the transaction.

The defendant throughout these proceedings was in India but on the 8th July 1932 an order was made requiring him to answer the interrogatories within seven days. The answers were filed on the 13th July 1932 by his attorney Olganathan Pillay. They were as follows:—

"1. In answer to interrogatory No. 1 I refer to paragraph 4 of the Statement of Defence and say that there was a settled account between the parties on or about the 5th day of September 1929.

"2. The answer to interrogatory No. 2 is covered by my reply to interrogatory No. 1."

No objection was taken that the answers had been given by the defendant's attorney and not by the defendant himself, nor was any objection taken by the defendant, as it was by his Counsel before the Court of Appeal, that the second interrogatory was a "fishing" interrogatory and ought to have been disallowed.

The plaintiff was not satisfied with the answer and on the 15th July 1932 applied by summons for further and better answers. The summons was heard before the learned Chief Justice on the 9th September 1932 when the defendant was required *personally* to file further and better answers within one month. The defendant has never complied with this order and being in default an application was made under section 352(2) of the Civil Procedure Code on the 17th October, 1932 that his defence be struck out. On the 21st October, 1932 the learned Chief Justice made an order in terms of the Summons and it is against this order that the defendant has appealed.

It will be seen that the plaintiff and the defendant were really at cross purposes. In making the order of the 9th September, 1932 the learned Chief Justice must have been satisfied that the defendant's answers were unsatisfactory and evasive and it is difficult to say that they were not so. If the defendant's case is as stated by Counsel before us, the defendant or his attorney could well have given an answer in the following form, viz:—

"1. In answer to interrogatory No. 1 the defendant does not allege that the sum $4,776 was paid either in cash or by cheque. He says that it was one of several items taken into consideration when the accounts between the plaintiff and defendant were settled on or about the 5th September, 1929 and a balance arrived at.

2. In answer to interrogatory No. 2 for the reasons stated in the answer to interrogatory No. 1 there is no account book showing payment of the sum of $4,776"

Better still the defendant might have applied to amend paragraphs 3 and 4 of his defence which would have made the interrogatories superfluous.

The defendant, however, did none of these things. He did not even appeal against the order of the 9th September, 1932 but continued in contempt by neglecting to obey the order made, offering excuses for his inaction which the learned Chief Justice found unsatisfactory. The order striking out his defence was accordingly made.

It was argued by the appellant that in any case a conditional order should only have been made (see *Chitty's* King's Bench Forms, 16th Ed. pages 364 and 365), and the attention of the Court

was also invited to Section 1144 of the Civil Procedure Code which reads are follows:—

> "No interlocutory order, from which there has been no appeal, shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as is just."

but this only means that the right of appeal is not interfered with by the existence of an interlocutory order which incidentally involved a decision of the point. It does not mean that it is open to appeal from an interlocutory order after the 21 days merely because the time for appealing from a final order has not expired (see *per* Jessel, M.R. and *per* James, L.J. in *White* v. *Witt*, 5 Ch. D. page 583).

I am clearly of opinion therefore that it is not open to the appellant to suggest that the order of the 9th September, 1932 was wrongly made. *Prima facie* the defendant is in contempt and has continued in contempt and has only himself to blame for the consequences of his failure to conduct the earlier proceedings properly.

It is not necessary to consider whether on the merits of the case the defendant, notwithstanding his contempt, should have had a further opportunity of complying with the order of the 9th September, 1932, as in my opinion the defendant is entitled to rely on breach by the plaintiff of the provisions of section 560 of the Civil Procedure Code which is fatal to any order being made under section 352. This objection is raised by the 7th and last ground of appeal which reads "There was no indorsement on the order of the 9th September 1932 directing compliance with the terms thereof." The indorsement is that required by section 560 of the Civil Procedure Code. The point was not taken in any of the affidavits read on the hearing of the summons before the learned Chief Justice, nor, as his notes show, was it raised in argument in chambers. It is true that the summons was not adjourned for argument in open Court, the learned Chief Justice having given a certificate that he required no further argument, but the fact remains that the point was never considered by the learned Chief Justice. In this respect the defendant was again at fault in his conduct of the proceedings.

Section 352 provides for two possible consequences of a failure to comply with an order to answer interrogatories, or for discovery. The first is attachment and the second is, in the case of a plaintiff, to have his action dismissed for want of prosecution, and in the case of a defendant, to have his defence struck out. This section corresponds to English Order XXXI rule 21.

Section 560 of the Civil Procedure Code corresponding to English Order XLI rule 5 reads as follows:-

> "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered, shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following:—
>
> "If you, the within-named A.B., neglect to obey this judgment (or order) by the time therein limited you will be liable to process of execution for the purpose of compelling you to obey the same judgment '(or order)'".

Now it was argued that striking out a defence is not a 'process of execution' within the meaning of the notice to be indorsed in accordance with Section 560. The point is not directly covered by authority, but it is to be remembered that the section is perfectly general in its terms and there can be no doubt that the order of the 9th September 1932 was an order "requiring a person to do an act." Provided the indorsement has been made the party upon whom the order is served has notice that it may be enforced by one of the methods prescribed by section 352, and it appears to be quite immaterial that warning is only given that one of such methods is attachment. It is quite clear to my mind that unless the indorsement is made the order cannot be enforced at all. Although as I have said there is no direct authority, there is a dictum on the subject in the case of *Hampden* v. *Wallis*, 26 Ch. D. page 746. This was a case where it was held that a Writ of Attachment could not issue if the necessary indorsement on the order had not been made. It was argued in that case that as an order for discovery under Order XXXI Rule 21 need not be served personally but by Rule 22 (our Section 353) can be served on the solicitor, the indorsement was not necessary. In the course of his judgment Bagallay, L. J. at page 752 states "The order (Order XLI) relates to all judgments, and rule 5 is perfectly general in its tone; there is nothing in it limiting it to any particular kind of orders. It is suggested that it was intended to be confined to process of contempt. I can see no ground for confining it in that way." The learned Lord Justice then proceeds to find that the rule applied just as much when service is on the solicitor under rule 22 as in cases where service is personal.

So far as I know this dictum and the construction to be put on Order XLI rule 5 have never been dissented from, and it follows that all

orders under section 352 must bear the indorsement before they can be enforced.

I would therefore allow the appeal and discharge the order of the 21st October, 1932.

Appeal allowed.

Solicitors for Plaintiff (Respondent)—
Braddell Bros.

Solicitors for Defendant (Appellant)—
Johannes and Sammy.

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

October 22, 1934.

IN *RE* THE WILL OF CHEAH SEONG GEOK—deceased.

[PENANG ORIGINATING SUMMONS No. 87 of 1934]

Will—Construction—Sole executor and trustee—Direction to divide trust estate at trustee's discretion amongst definite objects—Death of trustee before exercise of discretion—Validity of bequest—Destination of property bequeathed.

A testator devised and bequeathed to the sole executor and trustee of his will "all and singular my real and personal Estate whatsoever and wheresoever in the world upon trust (together with such portion thereof as shall be at the time of my decease) to get in, sell and convert and realise the same and upon such being done to divide, apportion, make over and deliver all the proceeds thereof in the usual manner or custom of the Chinese between and to himself his mother (my wife) and three brothers in such proportions usually adopted in such and similar cases and also with full power to my said Executor to hold detain or otherwise keep the said portions as to him shall seem most expedient or devisable to the benefit of the person receiving the same or his own benefit. The sole executor and trustee died without having exercised the discretion vested in him.

Held, that the bequest was not void for uncertainty

Held also, that the Executor had no right to keep the property for his own benefit and

Held also, that the property the subject of the bequest which remained unadministered should be divided equally amongst the ascertained objects thereof, namely, the testator's widow and his sons mentioned in the will.

Adjourned Originating Summons for construction of the will of the said Cheah Seong Geok deceased.

The testator died on the fourth of March 1910 after having made his will dated the 9th of March 1882, whereby he appointed Cheah Choon Seng to be the sole executor and trustee thereof. Probate of the testator's said will was on the 17th of July 1911 proved by Cheah Choon Seng before the Supreme Court at Singapore.

Cheah Choon Seng died on the 4th of February 1916 without having fully administered the estate and effects of the testator. By his last will made on the 31st of March 1912 Cheah Choon Seng appointed Cheah Hee Nyan the sole executor and trustee thereof.

Probate of the will of Cheah Choon Seng was granted to Cheah Hee Nyan on the 8th November 1916 by the Supreme Court at Penang.

Cheah Hee Nyan by deed dated the 23rd of December 1921 appointed Cheah Lean Guan trustee of Cheah Choon Seng's will jointly with himself. By deed dated the 11th of December 1922 Cheah Hee Nyan retired from the trusteeship leaving the said Cheah Lean Guan the sole trustee thereof.

The material provisions of the testator's will are set out in the headnote and also in the Judgment.

Cheah Seong Geok died leaving surviving him one son and five daughters, namely, Cheah Choon Seng (son), Cheah Kooi Keow, Cheah Mee Keow, Cheah Chow Lean, Cheah Foong Keow and Cheah Chien Keow (daughters).

The questions raised on the Originating Summons were:—

(1) Whether on the true construction of the Will of the said Cheah Seong Geok (deceased) and in the events that have happened Cheah Choon Seng is entitled to the whole of the remaining properties of the said Cheah Seong Geok (deceased) or only to a portion thereof

(2) If the said Cheah Choon Seng is entitled only to a portion, who are the other persons entitled and in what proportions.

Ong Huck Lim for the applicant, Cheah Lean Guan.

Ross for the estate of Cheah Choon Seng deceased.

Conaghan for Cheah Chow Lean.

Cur. Ad. Vult.

WHITLEY, J.—This Summons was taken out by Cheah Lean Guan as Trustee of the Will of Cheah Choon Seng deceased, and raises a question of construction of the Will of Cheah Seong Geok deceased who was the father of Cheah Choon Seng.

By this Will dated the 9th March 1882, Cheah Seong Geok appointed Cheah Choon Seng to be his sole Executor and Trustee. Cheah Choon Seng died in 1916 without having fully administered the Estate and by his Will he appointed